2-898 FILE COPY

FILED
DEC 18 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-898

CHARLES LAURENT FIOCCONI
and JEAN CLAUDE KELLA,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RAYMOND BERNHARD GRUNEWALD
Attorney for Petitioners
16 Court Street
Brooklyn, New York 11201

GRUNEWALD, TURK & GILLEN
Of Counsel

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Questions Presented	3
Statement of Facts	4

ARGUMENT

I. Where there is a formal extradition proceeding between nations, whether pursuant to treaty or comity, and the evidence presented in support of the extradition enumerates a specific charge in a stated jurisdiction, and the sending state extradities a person to stand trial on the specific charge in the specific jurisdiction, the person so extradited can be tried only for the specific crime for which he was extradited and only in the specific jurisdiction to which he was extradited 8

II. The charge for which petitioners were indicted in the district of Massachusetts is a separate offense from that which is charged in the Southern District of New York. Accordingly, they can not be lawfully tried for a specific crime for which they were not extradited. To do so violates their rights and guarantees under § 3192, Title 18, U.S.C. .. 9

III. Even when viewed in the light most favorable to the government, there was insufficient evidence, as a matter of law, to establish, beyond a reasonable doubt, that petitioner Kella was guilty as charged, either as to the substantive crimes charged or as to the conspiracy 10

PAGE

IV. The evidence, even when viewed in the light most favorable to the government, was insufficient, as a matter of law, to convict petitioner Fiocconi of the substantive crimes charged or as to the conspiracy 13

V. The trial court committed reversible error in its charge as to aiding and abetting being sufficient proof to establish petitioners' guilt, under the statute concerned, violating petitioners' rights under the Fifth Amendment to the United States Constitution 17

VI. Cumulative errors in the course of the trial created such prejudice as to deny petitioners a fair trial, thereby violating their rights under the Fifth Amendment to the United States Constitution 19

A. Two Kilos of Heroin 19

B. Testimony of Cleo Bennett 19

C. Court's Refusal to Take Judicial Notice of Uncontroverted Dates and Facts ... 20

CONCLUSION 22

APPENDIX A A1

APPENDIX B A3

APPENDIX C—Judgment of the United States Court of Appeals A5

AUTHORITIES CITED*

United States Constitution

Amendment V 2

Statutes

§ 174, Title 18, U.S.C. 2, 4

§ 3191, Title 18, U.S.C. 9

* The citations set forth in the pending petition filed under docket number 72-332 are incorporated herein as though fully set forth.

PAGE

Cases

Blas v. *Talabera*, 318 F.2d 617 (9th Cir. 1963) 21

Causey v. *United States*, 352 F.2d 203 (5th Cir. 1965) 12

Channel v. *United States*, 285 F.2d 217 (9th Cir. 1960) 20

Comm. of Pa. v. *Brown*, 373 F.2d 771 (3d Cir. 1967) 21

Continental Can Co. v. *United States*, 272 F.2d 312 (2d Cir. 1959) 21

Olmstead v. *United States*, 277 U.S. 438 (1928) .. 10

Pinkerton v. *United States*, 328 U.S. 640 (1946) .. 3, 12

Roberts v. *United States*, 416 F.2d 1216 (5th Cir. 1969) 11, 15

United States v. *Arnone*, 363 F.2d 385 (2d Cir. 1966) 12, 15

United States v. *Borelli*, 336 F.2d 374 (2d Cir. 1964) 20, 21

United States v. *Cantone*, 426 F.2d 905 (2d Cir. 1970) 12

United States v. *Fiocconi et al.*, F.2d (2nd Cir. 1972) .....

United States v. *Guglielmini*, 384 F.2d 602 (2d Cir. 1967) 21

United States v. *Jones*, 308 F.2d 26 (2d Cir. 1962) (En Banc) 12, 13, 15, 16, 18

United States v. *Landry*, 257 F.2d 425 (7th Cir. 1958) 13, 15

United States v. *Paroutian*, 299 F.2d 486 (2d Cir. 1962) .....

United States v. *Rauscher*, 119 U.S. 407 (1886) ... 3

United States v. *Webb*, 359 F.2d 558 (6th Cir. 1966) 14, 15

Wallach v. *Lieberman*, 219 F. Supp. 247 (S.D.N.Y. 1963), *aff'd.*, 366 F.2d 254 (2d Cir. 1966) 21

IN THE

Supreme Court of the United States

October Term, 1972

No.

CHARLES LAURENT FIOCCONI and JEAN CLAUDE KELLA,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Comes now Raymond Bernhard Grunewald, attorney for the petitioners, and hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, entered November 28, 1972.

Opinions Below

No formal written opinion was filed by the District Court. The Court of Appeals affirmed petitioners' conviction without opinion but noted, orally, in essence, that the petitioners' already have a petition pending before this Court which could be dispositive of the main issues.

Jurisdiction

The judgment of the panel of the Court of Appeals was entered on November 28, 1972. This petition is filed within thirty (30) days of the date of entry of judgment of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATUTE

§ 174, Title 21, United States Code:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned . . .

* * * * *

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

BLEED THROUGH POOR COPY

Questions Presented

1. Whether persons, having been formally extradited from a foreign country at the request of the government of the United States:

(1) where the extradition was based on a specific single charge indictment and evidence relating only to proof of that single charge, and

(2) where the foreign sending state specifically directed the extradition of the persons concerned to stand trial on the specific charge as stated in the indictment of a specific federal district, the District of Massachusetts,

while awaiting trial on this charge, may lawfully be subsequently subpoenaed to another federal district, arrested there pursuant to another indictment, and be tried and convicted of separate and distinct charges relating to events which occurred prior to their extradition?

2. Whether the opinion and doctrine set forth by this Court in *United States* v. *Rauscher*, 119 U.S. 407 (1886) is still the law of the land?

3. Whether there was sufficient evidence to establish, beyond a reasonable doubt, petitioners' guilt of the crimes charged?

(a) Absent any proof of a defendant's commission of the substantive crimes charged, and where the only evidence possibly linking him with the conspiracy charged occurred some five (5) days after the substantive crimes occurred, can he stand convicted even under the doctrine espoused in *Pinkerton* v. *United States*, 328 U.S. 640 (1946)?

(b) Can a defendant be convicted of violating § 174, Title 21, U.S.C., absent proof of knowledge of illegal

importation or that "possession" from which a statutory inference could flow?

(c) Is hearsay proof of original ownership of a prohibited drug in Europe sufficient to establish the inference created by § 174, Title 21, U.S.C.?

4. Whether the trial court committed reversible error in its charge as to proof of aiding and abetting constituting sufficient proof to convict even absent the possession from which the inference flowed as provided in § 174, Title 21, U.S.C?

5. Whether physical evidence of narcotics and testimony leading to its introduction and testimony as to supposed suspicious behavior, all subsequently stricken and testimony as to importations made by others long after petitioner's incarceration, coupled with trial court's refusal to take judicial notice of the uncontroverted fact of petitioners' continuing and lengthy incarceration, did not unfairly prejudice petitioners' right to a fair trial?

Statement of Facts

With respect to the essential facts preceding the trial itself and pertinent to the arguments on the subject matter of extradition, such have been fully set forth in the petition and joint appendix filed under docket number 72-332, and the same are hereby incorporated by reference, as though fully set forth herein, to avoid unnecessary duplication.

The application for a Writ of Habeas Corpus was renewed at the trial itself. (R. 641; R. 661)[1] Petitioners had also timely moved for dismissal on the grounds of the trial court's lack of jurisdiction. (R. 640-641; R. 661)

[1] Reference Key: R.—trial record.

BLEED THROUGH POOR COPY

At the trial the government called some 30 witnesses. Of these, only one, Richard Berdin, testified to knowledge with respect to shipments of heroin into the United States and statements allegedly made by other persons in furtherance of doing so. No alleged shipment was ever intercepted. Only one other witness, Cleo Bennett, testified as to having known the petitioners and that they were acquainted with other alleged conspirators. She stated that she had been petitioner Kella's girlfriend from October 1969 until about August 6, 1970. The substance of her testimony was only that Kella *knew* a Guido Randall, a "Louie", Jean Dumerain, petitioner Fiocconi, Francis Vanderberghe, Joseph Signoli and Andre Andreani. (R. 347-R. 389) She did not testify as to any criminal act on the part of either petitioner. Two witnesses were government chemists and the balance were witnesses with respect to chains of custody as to several cars.

Richard Berdin testified as to his part in a scheme to import large quantities of heroin into the United States during the period April 1970 through February 1971. (R. 35-R. 284; R. 662) The scheme involved secreting plastic bags, containing heroin, in various automobiles. Co-conspirators named Scapula, Signoli and Salles recruited him to bring the heroin to one Andre Labay, a courier recruited by Berdin, who in turn would smuggle it into the United States at a fee of $1,000 per kilo. (R. 42-R. 51) Once in New York, the heroin was returned to Berdin (R. 84-R. 85; R. 106-R. 110), who then returned it to one Jean Dumerain (R. 90), an agent of Signoli, or to Signoli himself. (R. 112) The $1,000 per kilo was paid to Berdin by the person receiving the heroin from him, either Dumerain (R.91) or Signoli (R. 114; R. 129-131) and Berdin then later shared this

fund with Labay. (R. 92-93; R. 114) Berdin later received an additional sum for his share in the conspiracy. (R. 139)

Berdin testified that he had met petitioner Fiocconi in Paris in April of 1970 in the company of Scapula, Signoli and Salles (R. 58-R. 60) and had later accidentally met him in May, 1970 also in Paris. (R. 67-R. 68) He testified to a third meeting in a car in Paris (R. 68-R. 68-69; R. 71) Berdin attempted to link Fiocconi to the conspiracy by testifying to statements of Signoli, indicating that the smuggled heroin was originally owned by Fiocconi and had been loaned to Scapula, Signoli and Salles by Fiocconi. (R. 78) There was no testimony that Fiocconi admitted ownership of the heroin to Berdin, or anyone else.

In every conversation Berdin said he had with other persons, many names were mentioned as people involved with heroin trafficking. Berdin's main associates were Scapula, Signoli, Salles and Labay. (R. 37-R. 61) In the United States he dealt with one Dumerain. (R. 63-R. 67; R. 257-R. 258) Kella's name was not mentioned.

On May 31, 1970, 4 to 5 days *after* the 37 kilos of heroin hidden in the first of three cars, a Bentley, had arrived and a few days after it had been turned over to Dumerain by Berdin, Berdin for the first and only time met petitioner Kella. (R. 82-R. 88; R. 91) Berdin, Kella and Dumerain had dinner at the Pierre Hotel. At dinner Kella advised Berdin on how to behave in New York. Berdin then testified:

> "After I told him that Labay wanted $2,000 a kilo, he say, 'No, we give him the regular price. If he is not happy, throw him away, we don't need him.'" (R. 98)

BLEED THROUGH, POOR COPY

Later they spent a social evening at a nightclub on 86th Street in Manhattan. (R. 95-R. 101) Berdin only met Kella on this one occasion and even then did not really know Kella's name. (R. 273)

Berdin testified as to additional shipments brought in by Labay in a Lancia automobile and in a Mercedes automobile. Evidence, consisting of two kilo bags of heroin recovered from a Lancia on May 11, 1972, after the ownership of the automobile changed hands many times, was in open view of the jury on the Government counsel table throughout the Government's case. The evidence and the witness' testimony as to the two kilos were later stricken by the trial judge. (R. 655) There was no heroin found in any of the other cars other than minute traces of heroin obtained many months after the alleged smuggling by special chemical tests after normal testing failed to indicate the presence of any heroin in any of the three automobiles. (R. 525-R. 551) The ownership of all of the cars in question had changed numerous times between the alleged smuggling and the chemists tests. (R. 406; R. 429; R. 439; R. 449; R. 454; R. 463; R. 481; R. 485; R. 490; R. 493) One of the vehicles in question had even been rigged in the interim by the special effects department of a motion picture studio for use in a motion picture and had in fact been so used. (R. 462-R. 480)

Petitioners did not testify. The Court refused to take judicial notice of uncontested facts and to so advise the jury, *i.e.* that petitioners had remained in police custody from August 6, 1970 until their extradition in October 1971, and subsequent thereto, even though the court had permitted evidence of other heroin importations subse-

quent to the petitioners' arrest and incarceration and to which petitioners were never linked. (R. 147-R. 151; R. 195; R. 659-R. 661)

ARGUMENT

I

Where there is a formal extradition proceeding between nations, whether pursuant to treaty or comity, and the evidence presented in support of the extradition enumerates a specific charge in a stated jurisdiction, and the sending state extradites a person to stand trial on a specific charge in a specific jurisdiction, the person so extradited can be tried only for the specific crime for which he was extradited and only in the specific jurisdiction to which he was extradited.

The arguments and propositions advanced by the petitioners in their previous petition, filed under docket number 72-332, together with the case law and facts cited in support thereof, are repeated and realleged as though fully set forth herein, thereby avoiding lengthy and unnecessary duplication, in support of their challenge to the jurisdiction of the trial court, Southern District of New York.

BLEED THROUGH POOR COPY

ARGUMENT

II

The charge for which petitioners were indicted in the District of Massachusetts is a separate offense from that which is charged in the Southern District of New York. Accordingly, they can not be lawfully tried for a specific crime for which they were not extradited. To do so violates their rights and guarantees under § 3192, Title 18, U.S.C.

The arguments and propositions advanced by petitioner's in their petition filed under docket number 72-332, together with the case law and facts cited in support thereof, are repeated and realleged as though fully set forth herein, thereby avoiding lengthy and unnecessary duplication, in support of their challenge to the jurisdiction of the trial court, Southern District of New York.

As was noted in their petition, docket number 72-332, and appendix C therein, Note Verbale No. 736, dated Rome, December 2, 1971 from the government of the United States of America to the government of the Republic of Italy, there will eventually be a Treaty of Extradition in effect which will *specifically prohibit, in* Article XV, *the trial or punishment of persons extradited for other than those crimes for which extradition was granted.*[2]

Realizing the enormity of the crime for which the petitioners stand convicted, albeit unlawfully, it would seem

---

[2] A letter from the Department of State, dated August 15, 1972, refers to the treaty as not in final form. However, it is apparent that although the treaty is not yet available, the extradition portion will contain the "typical modern provision on the rule of speciality" as may be seen in the recently negotiated treaty with Spain. (App. Ex. A; App. Ex. B)

pertinent to recall the historic admonition of *Mr. Justice Brandeis*, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928):

> "If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution."

For the above reasons, as spelled out in detail in petition No. 72-332, any detention and deprivation of liberty of the petitioners as a result of their conviction under 72 CR 4, S.D.N.Y. is illegal and void.

ARGUMENT

III

Even when viewed in the light most favorable to the government, there was insufficient evidence to establish, beyond a reasonable doubt, that petitioner Kella was guilty, either as to the substantive crimes charged or as to the conspiracy.

In a trial record of almost 800 pages, testimony crucial as to petitioner Kella is restricted, in essence, to some seven pages. (R. 95-R. 101) Of these seven pages, only three lines of testimony indicate Kella's acquaintance with trafficking. Berdin testified to a piece of conversation at a restaurant:

> "After I told him that Labay wanted $2000 a kilo, he say, 'No, we give him the regular price. If he is

BLEED THROUGH POOR COPY

> not happy, throw him away, we don't need him.' " (R. 98)

Then, in response to a suggestive question by the prosecution (objected to) Berdin also testified:

> "He say, 'You have to realize that it is something very dangerous. That means you can go to jail. That is why you have to be very, very careful about everything you do.' " (R. 99-R. 100)

There was another scrap of conversation, after the 37 kilo delivery had been made, Berdin recalling that Dumerain had told him that "Jean Claude" was very mad at him. (R. 88-R. 89) However, it was later revealed by Berdin that there was another "Jean Claude"—Demeester, who was an active co-conspirator. (R. 130; R. 148-R. 149) The subject of Dumerain's conversation was never positively identified.

In addition to this, as noted previously in the Statement at p. 5, one Cleo Bennett testified that Kella knew certain people. Berdin's testimony involved the same people in Berdin's drug trafficking.

It is elementary that neither association with conspirators nor knowledge of illegal activity constitute proof of participation in a conspiracy. *Roberts* v. *United States*, 416 F.2d 1216, 1220 (5th Cir. 1969). Nor can a person aid or abet in a crime which has already been completed. *Id.* at 1221.

The only evidence before the jury concerned a conversation that an informer said took place days after the substantive crime charged had been completed. It related to another conversation with a third person that the same

informer said took place a day or so after the substantive crime of importation had been completed.[3]

Mindful of the doctrine espoused in *Pinkerton* v. *United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), and in whose dissent petitioners' concur, it is contended that the distinction drawn in *United States* v. *Cantone*, 426 F.2d 905 (2d Cir. 1970) has particular application here. For, as in *Cantone*, it was not proved that Kella had joined in a conspiracy *before* the conversation took place assuming, *arguendo*, that this conversation joined him to the conspiracy. *Id.* at 904.

Furthermore, as noted in *Causey* v. *United States*, 352 F.2d 203, 207 (5th Cir. 1965):

> ". . . To establish the intent essential to a conviction for conspiracy the evidence of knowledge must be clear and not equivocal. A suspicion, however strong, is not proof and will not serve in lieu of proof. *Charges of conspiracy are not to be made out by piling inference upon inference. Guilt of conspiracy may not be inferred from mere association.*" [Emphasis supplied]

See also, *United States* v. *Arnone*, 363 F.2d 385, 403 (2d Cir. 1966).

Of particular application here is the doctrine set forth in *United States* v. *Jones*, 308 F.2d 26 (2d Cir. en banc 1962). There is no *evidence* in this case that petitioner

---

[3] Berdin arrived in New York around May 25, 1970. One day later he met Labay at the N. Y. Hilton Hotel. A day later Labay showed him the 37 kilos. (Counts 2 and 3) Labay stated he wanted $2000 per kilo in the future. (R. 82-R. 86) Berdin met Dumerain one or two days later on Fifth Ave. A day later he met Dumerain again and a day later Berdin met Kella for the first and *only* time. (R. 91; R. 96)

BLEED THROUGH POOR COPY

Kella knew the origin of the heroin involved. The government relied on the theory that Kella, although concededly never shown to be in possession of the drug, was an aider and abettor of persons who were in possession and the trial court so charged. (R. 748-R. 749) But, as noted previously, as to the substantive charges, one cannot aid and abet in a crime that has been completed. Furthermore, the mere fact of aiding and abetting in the possession of narcotics by others, particularly as to conspiracy, does not give rise to the requisite inference of guilty knowledge. The prosecution cannot rely on the mere fact of a defendant's knowledge that another possessed narcotics for sale, short of possession by the defendant himself, to establish the requisite scienter on the part of a defendant. *United States* v. *Jones, Id.* at 32-33. See, *United States* v. *Landry*, 257 F.2d 435 (7th Cir. 1958).

For the reasons stated, petitioner Kella's conviction should be reversed and the indictment dismissed.

ARGUMENT

IV

The evidence, even when viewed in the light most favorable to the government, was insufficient to convict petitioner Fiocconi of the substantive crimes charged or as to the conspiracy.

Berdin's testimony and the hearsay declarations of his co-conspirators, as related by Berdin, clearly show Fiocconi to be a narcotics trafficker in France. But in no way does Berdin's evidence substantiate Fiocconi's participation in either the conspiracy charged or in the substantive crimes

charged relative to the 37 kilo heroin shipment smuggled into the United States on May 25, 1970 in the Bentley automobile.

Berdin testified that he had met with Fiocconi in Paris on only three occasions, the latter two being chance or brief meetings. (R. 59-R.71) Berdin testified that Fiocconi had advised him about the care that must be exercised in the United States, his manner of travel to the United States and inquired into his visa status. (R. 59-60; R. 68) However, at no time was Fiocconi instructed as to the particular 37 kilo shipment which was brought from Marseilles by Scapula and which Berdin delivered to Labay to smuggle to New York. (R. 61-R. 62)

Fiocconi evidenced no interest or dominion in that shipment and it is only the hearsay declarations attributed to Signoli that give any support to the proposition that Fiocconi had any interest in the heroin which Scapula, Signoli and Salles were sending to the United States by way of Berdin. Signoli's hearsay declarations, as reported by Berdin, admit that Fiocconi was not paid for the heroin but rather that he "lend" the drug to Scapula, Signoli and Salles, thus showing non-participation in this venture. (R. 78) This testimony, by the prosecution's witness, if accepted at face value, establishes Fiocconi as the origin of heroin, perhaps its true owner, but not in any way as a co-conspirator.

The necessary evidence required to establish Fiocconi's agreement to or participation in the conspiracy to smuggle the 37 kilos of heroin, or any other shipment, is lacking. See, *United States* v. *Webb*, 359 F.2d 558 (6th Cir. 1966). Fiocconi's mere association with conspirators is insufficient

BLEED THROUGH POOR COPY

to establish conspiracy. *United States* v. *Arnone*, 363 F.2d 385 (2d Cir. 1966); *United States* v. *Webb*, *supra*. Moreover, adding knowledge of the violation of the law to an association with conspirators, is likewise insufficient. *Roberts* v. *United States*, 416 F.2d 1216 (5th Cir. 1969). Clearly, the intention to join a particular conspiracy cannot be lacking from the proof.

As to the substantive crimes and the charges of aiding and abetting in their commission, proof must be established of Fiocconi's participation in and knowledge of the illegal importation into the United States of the particular shipment of drugs or that he was in at least constructive possession, *after importation into the United States*. *United States* v. *Jones*, 308 F.2d 26, 31 (2d Cir. en banc, 1966). However, all testimony relative to Fiocconi ends prior to the importation of *any* of the heroin testified to by Berdin. Moreover, there is no testimony that Fiocconi was ever in the United States so any kind of "possession" necessary for conviction under either the conspiratorial or the substantive counts must be lacking. *United States* v. *Landry*, 257 F.2d 425, 431-432 (7th Cir. 1958).

While possession has been defined as both the power to control the disposition of drugs, as well as actual physical custody, neither has been proven as to Fiocconi. *United States* v. *Jones*, *supra* at 30.

In the case at bar there has been no showing of even constructive possession and the mere knowledge and even approval of narcotics trafficking and traffickers is not enough to establish even this level of possession. *Id.*

What we have here is evidence of possible prior dealings, *in France*, by Fiocconi and the novel idea that Ficconi's

ownership of drugs used by Signoli and Berdin is proof of their possession. As stated in *United States* v. *Landry*, 257 F.2d 425, 431:

> ". . . Assuming, as we think proper, that Congress employed the word 'possession' in its ordinary and usual connotation, it certainly means something different than 'ownership'. Ownership is not proof of possession anymore than possession is proof of ownership. If Congress had intended that a presumption arise against the owner as well as the possessor of a narcotic, it would have so declared. The same can be said of constructive possession or the unexercised right of possession.
>
> * * * * *
>
> ". . . We reject the idea that speculation can be employed as a substitute for proof."

Counts I, II and III, all contain the statutory prerequisite of doing certain things with respect to narcotic drugs, "*after* the said narcotic drugs had been imported . . . into the United States . . . *knowing* that the said narcotic drugs had been imported . . . *into the United States* . . ."

For the reasons set forth above, the conviction as to Fiocconi should be reversed and the indictment dismissed.

BLEED THROUGH POOR COPY

ARGUMENT

V

The trial court committed reversible error in its charge as to aiding and abetting as being sufficient proof to establish petitioners' guilt, under the statute concerned, violating petitioners' rights under the Fifth Amendment to the United States Constitution.

The trial court charged:

> "Under these substantive counts, it will occur to you that there is no direct evidence that either defendant on trial physically handled the heroin following its alleged importation into this district. The government makes no contention that they did. It relies upon another federal law, generally referred to as to the aiding and abetting law, which reads as follows:
>
> 'Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.'
>
> Accordingly, you may find a defendant guilty of the offenses charged if you find beyond a reasonable doubt that another person committed the offense and that a defendant aided and abetted him. In order to find that a defendant aided and abetted another in the importation, receipt, concealment or sale of heroin, you must be satisfied that he in some way knowingly associated himself with the criminal venture in a meaningful manner, that he knowingly participated in it as something he wished to bring about and by some action of his to make it succeed, that he had a stake in its outcome.
>
> In other words, if one fully aware of what he is doing plays a signficant rcle in furthering a trans-

> action prohibited by law, he is an aider and abettor and as such, he is equally guilty with the person who actually commits the crime.
>
> Against that background, and the applicable law to the specific charges, let us turn to the testimony." (R. 748-R. 749)

Counsel for petitioners objected to this portion of the charge, as given, and requested corrective instructions. (R. 766; R. 768)

There was no evidence that either petitioner had possession of narcotics at any time. The prosecution's proof relied on aiding and abetting. But aiding and abetting is *not* enough, albeit the trial court so charged, to find the petitioners guilty of the crimes charged here. *United States* v. *Jones*, 308 F.2d 26, 32-33 (2d Cir. en banc 1962).

In the context of the court's charge, the jury was able to find petitioners guilty on the basis, not by proof as to their independent knowledge, but on the basis of proof as to other defendants' guilty knowledge, or proof flowing from the possession by other defendants with the inferences arising out of that possession imputed to petitioners.

For these reasons petitioner's conviction should be reversed.

ARGUMENT

VI

Cumulative errors in the course of the trial created such prejudice as to deny petitioners a fair trial and, thereby violating their rights under the Fifth Amendment to the United States Constitution.

A. Two Kilos of Heroin.

After a long trail of documentary witnesses, testimony was elicited as to two kilos of heroin found in a Lancia automobile on May 11, 1972. An agent testified at length as to how he found them in the car. (R. 506-R. 518) They were received in evidence over objection. (R. 523) Appropriate motions to strike the evidence and for a mistrial were made at the end of the government's case (R. 630; R. 643; R. 655) The motion to strike was granted but motions for mistrial were denied. (R. 655) A brief instruction to disregard was given to the jury. (R. 656)

B. Testimony of Cleo Bennett.

Cleo Bennett testified about her travels with petitioner Kella. Despite the objections of counsel and the admonition of the Court to the prosecution not to pursue matters immaterial to the trial issues, the prosecution persisted in creating an aura of suspicion as to events not connected to the petitioners, (R. 383-R. 385) and which was, admittedly, based on the hope that the jury's minds could be laden with prejudicial surmise. (R. 649) The defense motion to strike was granted but a mistrial was denied. (R. 642; R. 655)

C. Court's Refusal to Take Judicial Notice of Uncontroverted Dates and Facts.

It is an uncontroverted fact that the petitioners were incarcerated in Italian prisons from August 6, 1970 until October 6, 1971 when they were transferred to custody in the United States where they continued in custody. The trial court had presided over motions directed to petitions for writs of habeas corpus and had written an opinion, filed March 16, 1972, which dealt with these very facts. Certainly there is not a shred of evidence linking petitioners with the testimony of heroin importations made after the conversation attributed to Kella on May 31, 1970. Nevertheless the trial court refused to take judicial notice and Berdin's testimony with respect to this evidence was permitted to stand despite appropriate motions, the defense being relegated to calling the defendants or hostile government agents. (R. 641-R. 644; R. 659-R. 662)

It is submitted that the two packaged kilos of heroin accepted into evidence before the jury, "subject to connection", so contaminated the trial as a whole as to preclude a fair trial. It was vitally and visually corroborative of Berdin's testimony in general. See, *Channel* v. *United States*, 285 F.2d 217 (9th Cir. 1960).

United States v. *Borelli*, 336 F.2d 374 (2d Cir. 1964), cited by the prosecution (R. 650) and whose rationale, as interpreted by the trial court, was the underlying factor in the refusal by the court to let the jury know uncontroverted facts which were the subject of a judicial decision in this Circuit, (R. 660; 131a) left the trial court caught up in the proposition that incarceration is not necessarily proof of an individual's termination of his participation in a conspiracy and thus, its proof could be excluded. That is not

the point. Petitioner's, it is submitted, had a right to have that factor brought to the jury's attention in the light of the evidence elicited at the trial. It was a vital matter for the jury to consider. *United States* v. *Borelli*, *Id.* at 389.

As was noted in *Continental Can Co.* v. *United States*, 272 F.2d 312, 314-315 (2d Cir. 1959), dealing, as in the instant case, with a situation involving undisputed facts:

> "In reaching their decision, neither courts nor administrative bodies should ignore the realities of life and disregard common knowledge even though such knowledge may not have achieved a place within the purview of judicial notice."

When prejudice results from failure to take judicial notice such is grounds for reversal. See, *Blas* v. *Talabera*, 318 F.2d 617, 619 (9th Cir. 1963). A Federal court can take judicial notice of matters of record in its own court as well as courts within its jurisdiction. See, *Comm. of Pa.* v. *Brown*, 373 F.2d 771, 778 (3rd Cir. 1967); *Wallach* v. *Lieberman*, 219 F.Supp. 247, 248 (S.D.N.Y. 1963), *aff'd.*, 366 F.2d 254 (2d Cir. 1966).

It is respectfully submitted that even if no single issue raised in Arguments III through VI, above, would require reversal of the convictions, the fact that they occurred created a total effect that cast such a serious doubt on the fairness of the trial that the convictions must be reversed. *United States* v. *Guglielmini*, 384 F.2d 602 (2d Cir. 1967).

CONCLUSION

For the reasons stated above, petitioners' rights under the Constitution and Laws of the United States, and the Law of Nations, were violated. Their petition for a Writ of Certiorari should be granted so that this Court can consider the important questions of the rights of extradited persons and due process of law.

Respectfully submitted,

RAYMOND BERNHARD GRUNEWALD
Attorney for Petitioners
16 Court Street
Brooklyn, New York 11241

GRUNEWALD, TURK & GILLEN
Of Counsel

APPENDIX A

DEPARTMENT OF STATE

Washington, D. C. 20520

August 15, 1972

Mr. Norman Turk
Grunewald, Turk & Gillen
Attorneys at Law
16 Court Street
Brooklyn, New York 11241

Dear Mr. Turk:

I refer to your letter of July 19 with which you requested a copy of the newly negotiated extradition treaty between the United States and Italy and in particular Article XV of that treaty.

Substantial agreement has been reached with the Government of Italy on the text of a new extradition treaty. However, the treaty is not yet in final form and has not been signed, certain provisions remaining under study by the two governments. The treaty terms have not been made public either in the United States or Italy. Until negotiations have been concluded, the text is considered to remain in confidence as between the two governments. If the treaty is signed, we would be prepared to make its text, or Article XV of the treaty, available to you per your request. Although Article XV thus has no legal force and effect at this time—being still a negotiating text—it is anticipated that the treaty once concluded will contain provisions on the

rule of speciality. Our extradition treaty with Spain, copy enclosed, contains a typical modern provision on the rule of speciality (Article XIII).

Sincerely yours,

K. E. MALMBORG
Assistant Legal Adviser for
Management and Consular Affairs

Enclosure:

Treaty with Spain

A3

APPENDIX B

TREATIES AND OTHER INTERNATIONAL ACTS SERIES 7136

EXTRADITION

Treaty Between the
UNITED STATES OF AMERICA
and SPAIN

Signed at Madrid May 29, 1970

[SEAL]

ARTICLE XIII

A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless:

1. He has left the territory of the requesting Party after his extradition and has voluntarily returned to it;

2. He has not left the territory of the requesting Party within 45 days after being free to do so; or

3. The requested Party has consented to his detention, trial, punishment or to his extradition to a third State for an offense other than that for which extradition was granted.

These stipulations shall not apply to offenses committed after the extradition.

Appendix B

ARTICLE XIV

A Party which receives two or more requests for the extradition of the same person either for the same offense, or for different offenses, shall determine to which of the requesting States it will extradite the person sought, taking into consideration the existing circumstances and particularly the posibility of a later extradition between the requesting States, the seriousness of each offense, the place where the offense was committed, the nationality of the person sought, the dates upon which the requests were received and the provisions of any extradition agreements between the requested Party and the other requesting State or States.

APPENDIX C

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and seventy-two.

Present:

HON. HENRY J. FRIENDLY

Chief Judge

HON. STERRY R. WATERMAN
HON. PAUL R. HAYS

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LAURENT FIOCCONI and JEAN CLAUDE KELLA,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

VINCENT A. CARLIN
Chief Deputy Clerk

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	8
Conclusion	14

CITATIONS

Cases:

Fiocconi v. *Attorney General of the United States*, 339 F. Supp. 1242, affirmed, 462 F. 2d 475, certiorari denied December 11, 1972, No. 72-332	1, 2, 4, 8, 9, 11
United States v. *Jones*, 308 F. 2d 26	12
United States v. *Rauscher*, 119 U.S. 407	4, 8, 9, 11

Statutes:

21 U.S.C. (1964 ed.):	
Sec. 173	3
Sec. 174	4, 12

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-898

CHARLES LAURENT FIOCCONI AND
JEAN CLAUDE KELLA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals affirmed petitioners' convictions without opinion. The opinion of the court of appeals affirming the district court's denial of a writ of habeas corpus (339 F. Supp. 1242) is reported at 462 F. 2d 475.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1972. The petition for a writ of certiorari was filed on December 18, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States District Court for the Southern District of New York had jurisdiction to try petitioners for narcotics offenses when they had been extradited from Italy on an indictment filed in the District of Massachusetts charging other narcotics offenses.

2. Whether the evidence was sufficient to sustain petitioners' conviction.

3. Whether the trial court's instructions were proper.

4. Whether the trial court's ruling on the admissibility of evidence denied petitioners a fair trial.

STATEMENT

1. In November 1969, petitioners, citizens of France, were indicted in the United States District Court for the District of Massachusetts for having conspired from September 1968 to April 1969 to import heroin into the United States in violation of 21 U.S.C. (1964 ed.) 174. Bench warrants were issued but could not be executed. Interpol found petitioners in Italy and Italian authorities arrested them there in August 1970.[1] A month later the United States Embassy in Rome requested petitioners' extradition. Although the 1868 Extradition Convention between the two governments (15 Stat. 629, as amended) does not include narcotics offenses, the Embassy sought extradition as an exer-

[1] When arrested, petitioners gave false names and false passports to the Italian authorities; for this offense they were convicted in Italy and sentenced to five months' imprisonment. 339 F. Supp. at 1244.

cise of comity since the Convention does not preclude extradition for narcotics offenses and since petitioners' acts, as alleged in the indictment, would be crimes under Italian law. After appropriate proceedings, a court in Florence directed petitioners' extradition for the purpose of standing trial on the Massachusetts charges. 462 F. 2d at 476–477.

After being removed to Boston on October 6, 1971, petitioners pleaded not guilty.[2] Pre-trial bail was fixed at $250,000 each, and was met by a surety bond secured by a certified check for $500,000 drawn on a Swiss bank. Shortly after their release on bail, petitioners were subpoenaed to appear before a federal grand jury in the Southern District of New York. When they appeared they were arrested on warrants issued under an indictment returned the same day, which charged them with a substantive crime involving the sale and concealment of heroin on May 27, 1970. Bail was fixed on those charges at $100,000 each, which petitioners were unable to post. Subsequently, the grand jury returned a superseding indictment charging petitioners and twenty-one others with having conspired to violate the narcotics laws from January 1970 to January 1972 (the date of the indictment), and with two substantive offenses in May 1970. Bail was again set at $100,000, and petitioners were still unable to meet it. 462 F. 2d at 477.

Petitioners then sought a writ of habeas corpus from the United States District Court for the South-

[2] Petitioners later pleaded guilty and on October 24, 1972, were sentenced to nineteen years' imprisonment; these sentences were subsequently reduced to fifteen years.

ern District of New York, contending that their detention there on a charge other than the one for which they had been extradited was an act of bad faith under international law, depriving the district court of jurisdiction over them and requiring their release, citing *United States* v. *Rauscher,* 119 U.S. 407. The district court denied the petition on March 16, 1972, 339 F. Supp. 1242; the court of appeals affirmed, 462 F. 2d 475; and this Court denied certiorari on December 11, 1972, No. 72–332.

2. In the meantime petitioners had been convicted on May 24, 1972, after a jury trial in the United States District Court for the Southern District of New York, of importing and selling 37 kilograms of heroin, and conspiring to commit this offense, in violation of 21 U.S.C. (1964 ed.) 173, 174. They were sentenced to twenty-five years' imprisonment (concurrent five-year terms on the substantive offenses to run consecutively with a twenty-year term for the conspiracy violation).[3]

3. The evidence at trial showed that petitioners were the ringleaders of an international conspiracy which smuggled vast quantities of heroin into the United States and distributed it.

During April 1970, petitioner Fiocconi, whom co-defendant Berdin knew and identified at trial as "Charlot" (Tr. 58–59), and several of his "lieutenants," met with Berdin in France and convinced him to invest money in a heroin smuggling operation, and

[3] Twenty-one co-defendants were severed from the trial for various reasons.

to try to find new methods and new couriers for Fiocconi's operation (Tr. 41–48, 57–60).

After being told that the shipper would receive $1,000 plus expenses, for each kilogram of heroin delivered to the United States, Berdin recruited co-defendant Labay, another Frenchman, who purchased a Bentley in which they hid 37 kilograms of heroin belonging to Fiocconi (Tr. 48–55, 61–62, 78). At the end of April 1970, Fiocconi arranged a meeting with Berdin in Paris (Tr. 58, 60). Fiocconi asked Berdin whether he trusted Labay; Berdin assured him that the smuggler would cause "no problems." Fiocconi then told Berdin that he would be contacted in the United States at the United Nations building (Tr. 59–60).

On May 27, 1970, the Bentley, with heroin hidden in it, arrived in New York City aboard the Queen Elizabeth II (Tr. 328–332). After the car passed through Customs, Labay, who had previously arrived in New York, removed the heroin and gave it to Berdin (Tr. 83–86). Berdin then met with co-defendant Dumerain, one of petitioner Kella's lieutenants (Tr. 88–90). Berdin turned the drugs over to Dumerain, who paid Berdin $2,000 expense money and $37,000 for importing the 37 kilograms of heroin (Tr. 90–91). The next day, Berdin met Dumerain as planned at the Hotel Pierre, where he was introduced to Kella (Tr. 95–96). At dinner that evening, Berdin told Kella that Labay was dissatisfied and wanted $2,000 per kilo. Kella rejected the request, commenting: "No, we give him the regular price. If he is not happy, throw him away, we don't need him" (Tr. 98).

At the end of June 1970, Labay again smuggled heroin into New York City, this time concealing the drugs in a Lancia automobile shipped to this country aboard the S.S. France (Tr. 104, 106, 338–339). Labay gave Berdin 3 or 4 suitcases of heroin (Tr. 105–108), which he took to an apartment in Brooklyn, New York, rented by Cleo Kathleen Bennett, Kella's girlfriend (Tr. 109–112, 135, 152). There codefendant Signoli, who complained that one kilo was missing from the 70 kilo shipment, paid Berdin approximately $70,000 for the heroin (Tr. 113–115).

Cleo Bennett testified that during June or July 1970, she flew with Kella to Brussels, where they were met at the airport by Fiocconi. Fiocconi and Kella greeted each other with a hug and a kiss and, while Miss Bennett remained in an airport restaurant, walked off in conversation (Tr. 369–371). When Kella returned alone, he and Miss Bennett flew to Paris and then to Casablanca, where they again met Fiocconi and codefendant Vanverberghe with whom they stayed for approximately four days (Tr. 371–374).

In August 1970, Berdin met Signoli and codefendant Andreani at a bar in New York (Tr. 121–122). Signoli told Berdin that Labay had shipped a third automobile (a Mercedes) to New York City and that Andreani was replacing him because Berdin had failed to follow the instruction that he was not to spend too much money in New York. Thereafter, Berdin met with Signoli and Andreani and was given approximately $72,000 for Labay (Tr. 129–132).

Before Berdin left for France, codefendant Randell contacted him and arranged to meet him in Brooklyn (Tr. 132–133). Randell arrived at the meeting with a French girl and all three went to the apartment of Cleo Bennett, petitioner Kella's girl friend. There, Randell gave Berdin and the French girl approximately $200,000 each to take back to France (Tr. 133–136). Berdin and the girl then went to Kennedy Airport and flew to Brussels (Tr. 136–138).

In Brussels, Berdin delivered the money and then returned to Paris, where he met codefendant Scapula who gave him an envelope containing $50,000, which represented his share of the proceeds from the three smuggling operations (Tr. 138–139). When Berdin complained that he had been cheated, Scapula agreed that he had not been dealt with fairly and produced another envelope, which he said contained a lot of money and represented Fiocconi's and Kella's shares (Tr. 140).

At trial, traces of heroin found in the Bentley and in the Mercedes were received in evidence (Tr. 529–541; G. Ex. 57, 57A, 58A, 58B). The government also sought to introduce two half kilo bags of heroin (G. Ex. 55, 56) found by a customs officer on May 11, 1972, still hidden in the Lancia (Tr. 506–513, 520–523). At the conclusion of the government's case, the trial court ruled that there was insufficient evidence of ownership or possession of the Lancia between July 1, 1970, when the car arrived in New York, and March 1971, when the automobile was purchased at

an auction (Tr. 481–482). Therefore, the court granted petitioners' motion to strike the two half kilo bags of heroin and the testimony of the government's chain-of-ownership witnesses (Tr. 655). The court, which denied petitioners' motion for a mistrial, instructed the jury to disregard that heroin (Tr. 656, 658). The court also granted petitioners' motion to strike, and instructed the jury to disregard two pages of Miss Bennett's direct testimony on the ground that the inferences to be drawn were too speculative (Tr. 655–656). That testimony related to Miss Bennett's meeting Fiocconi's girl friend in Paris in July 1970, and accompanying her when she took an attache case into a bank and left it there (Tr. 383–384).

In a pre-trial motion and again at trial after the government and Fiocconi rested, Kella requested the court to take judicial notice of the fact that petitioners had been arrested and incarcerated in Italy in August 1970 (Tr. 659–660). The court denied the motion but noted that there were witnesses with personal knowledge who were available to testify on that subject. Petitioner Kella, however, like Fiocconi, rested without calling any witnesses, or presenting any evidence (Tr. 660–661).

ARGUMENT

1. Petitioners renew their claim, more fully presented in their prior petition to this Court, No. 72-332, certiorari denied, December 11, 1972, that their trial in the United States District Court for the Southern District of New York was an act of bad

faith under international law, rendering that court without jurisdiction and requiring their release. For this result they rely on *United States* v. *Rauscher*, 119 U.S. 407.

The district court rejected this contention on the ground that *Rauscher* applied only to extradition according to treaty, while the instant case involved extradition under the principle of comity, and that "[a]bsent a treaty or law which limits jurisdiction, a court may try a defendant for any crime for which he has been properly indicted," as this Court held in *Ker* v. *Illinois*, 119 U.S. 436. See 339 F. Supp. at 1246.

On the other hand, the court of appeals thought the district court, although reaching the correct result, had read *Rauscher* too narrowly. To the court of appeals, the question whether petitioners were entitled to relief under *Rauscher* depended on "whether the surrendering state would regard the prosecution at issue as a breach" (462 F. 2d at 480). Since the New York charges, although relating to a period subsequent to that covered by the Massachusetts indictment, were of the "same character as the crime for which [petitioners] were extradited," the court held that, absent an affirmative protest from Italy, comity had not been breached (462 F. 2d at 480–482).

The issue petitioners seek to raise in this Court is whether the district court had jurisdiction to try them; in light of all the information presently available, however, there is no basis for concluding that the Italian government considers petitioners' New York

trial a breach of good faith. Certainly there was no objection from the Italian government at the time of trial, nor any hint of an objection in the interim. In the absence of such an objection, the New York prosecution involves no international law implications, regardless of whether these issues would in any event be matters for the courts; certainly there is no ground for retroactively depriving the district court of jurisdiction it has already lawfully exercised in view of the situation at the time.[4]

As we pointed out in our Memorandum in Opposition in No. 72-332, the United States Embassy in Rome was informed on October 4, 1972, that the Court of Appeals in Florence had approved an extension of extradition to include the New York offenses, although this decision has now been appealed by petitioners to the Court of Cassation. We are aware of no further developments in the proceedings in Italy.[5]

---

[4] Even if a later objection by the Italian government, which seems unlikely, would have a retroactive effect on the district court's jurisdiction, this is not a reason for the Court to hold this case pending a final, official decision by the Italian authorities. Petitioners are lawfully incarcerated under their 15-year sentences for the Massachusetts offenses. If at some time in the future the Italian government does protest the New York prosecution, petitioners will have other remedies to pursue on the question whether such an objection affects the validity of their New York sentences.

[5] We are informed by the Department of State that the American Embassy in Rome advised on March 2, 1973, that the "matter [is] still pending in Italian Supreme Court of Cassation." If there are any developments while the case remains on this Court's docket, we shall promptly submit a supplemental memorandum so advising the Court.

Nevertheless, we believe there is no reason for the Court to hold this case pending action by the Italian authorities and that further review regarding the extradition issue is not warranted. Even assuming *arguendo* the continuing validity of *Rauscher,* about which the court of appeals expressed some doubt in light of developments in international and domestic law and practice over the last century, see 462 F. 2d at 477–478, we believe that both courts below correctly concluded that the district court had jurisdiction to try this case. Both courts noted the similarity between the crimes charged in the New York and Massachusetts indictments and the improbability that Italy would consider it a breach of faith for the United States to have tried petitioners on the New York charges. 462 F. 2d at 481; 339 F. Supp. at 1247.

2. Petitioners claim that there was insufficient evidence to support their convictions. As the Statement indicates, codefendant Berdin, the government's principal witness whose story was corroborated and uncontroverted, supplied ample direct evidence that the petitioners, with whom he conspired, did knowingly conspire and smuggle thirty-seven kilograms of heroin into the United States.

3. Petitioners' contention that the trial court instructed the jury that they could base a finding of petitioners' guilt solely upon proof of their aiding and abetting the importation of the heroin ignores the four pages of jury instructions (Tr. 744–748) preceding the trial court's aiding-and-abetting instruction wherein the court carefully instructed the jury

about all the elements of each crime that the government was required to prove. Viewed in context, the trial court's aiding-and-abetting instruction only served to inform the jury that the government was not required to prove actual physical handling of the heroin by each petitioner (Tr. 748).

Petitioners rely on *United States* v. *Jones*, 308 F. 2d 26, 32–33 (C.A. 2), but *Jones* did not hold that proof of aiding and abetting can never support a conviction under 21 U.S.C. 174. Rather, *Jones* required that where no actual possession was proven, the government could not rely on an inference of knowledge of illegal importation but must independently prove such knowledge. Here, the trial court repeatedly instructed the jury that, as an element of each substantive offense, the government must prove to the jury's satisfaction that each petitioner acted willfully and knowingly (Tr. 726, 744–748).

4. Petitioners contend that they were prejudiced by the admission of evidence subsequently withdrawn from the jury's consideration and by the trial court's refusal to take judicial notice of the dates of their foreign incarceration.

At trial, the evidence from the Lancia automobile and Miss Bennett's testimony about the errand she performed with Fiocconi's girlfriend were both conditionally admitted into evidence, subject to additional proof of their relevancy and connection with peti-

tioner's heroin smuggling (Tr. 384, 461, 523, 656). After ruling at the conclusion of the government's case that sufficient proof of relevancy had not been shown, the trial court instructed the jury to eliminate from their consideration, any evidence or chain-of-custody testimony involving the Lancia automobile or the two bags of heroin found in the Lancia, and Miss Bennett's testimony about her errand with Fiocconi's girlfriend (Tr. 655–658). This instruction was adequate under the circumstances; in addition, there was other competent evidence of Miss Bennett's travels with Kella (Tr. 369–374) and of heroin found in automobiles shipped to New York City by the petitioners (Tr. 529–541), so that petitioners were not prejudiced by the conditional admission of this evidence.

The trial court was not presented with anything other than counsel's averment that petitioners were incarcerated in Italy on August 6, 1970. We note that such incarceration in no way affected the evidence of petitioners' prior participation and leadership in their heroin smuggling efforts. Since the trial court offered to allow counsel to call readily available witnesses for the limited purpose of establishing the facts of petitioners' foreign incarceration, a fact not otherwise commonly known, petitioners suffered no prejudice when the court properly refused to take judicial notice of their bare averments.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
JEROME M. FEIT,
VICTOR D. STONE,
Attorneys.

MARCH 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973